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In The

Supreme Court of the United States

October Term, 1974

No. 74-1603

MEYER GOLD,

Petitioner,

vs.

FANNY HANDEL and PREL CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT, PREL CORPORATION, IN OPPOSITION

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OPINIONS BELOW

The United States Court of Appeals affirmed the order of the District Court in open court, without written opinion (Appendix A (1a), Appendix B (2a) to the Petition).

The petition for rehearing was denied without opinion (Appendix C (4a) to the Petition).

BLEED THROUGH

JURISDICTION

Respondent Prel Corporation does not question the jurisdiction as set forth in the petition.

QUESTIONS PRESENTED

The questions presented by the petition are:

(i) whether the petitioner was deprived of his property without due process of law when the District Court entered a default judgment pursuant to F.R.C.P. 37(d) because of petitioner's "blatant disregard for the process of justice."

(ii) whether the District Court abused its discretion in denying petitioner's motion to vacate a default judgment pursuant to F.R.C.P. 60(b).

CONSTITUTIONAL PROVISION INVOLVED

Amendment V

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

RULES INVOLVED

Federal Rules of Civil Procedure, Rule 37(d)

> "if a party . . . fails . . . to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the

interrogatories . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (a), (b), and (c) of subdivision (b)(2) of this rule."

Rule 37(b)(2)

"if a party . . . fails to obey an order to provide or permit discovery . . ., the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(c) An order . . . rendering a judgment by default against the disobedient party."

Rule 60(b)

"On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . ."

PRELIMINARY STATEMENT

The petitioner's statement of the case is a mere skeleton description of the dispute herein. A more detailed statement of the facts which transpired in the previous proceedings had heretofore is necessary to enable this Court to place the petitioner's conduct and the District Court's ruling as a result thereof in their proper perspective.

The plaintiff, Fanny Handel, (hereinafter referred to as "respondent Handel"), a stockholder of Prel brought this derivative action for the benefit of nominal defendant, Prel Corporation (hereinafter referred to as "respondent"). Judgment, by default, was entered against the petitioner in favor of respondent on January 18, 1974, because of petitioner's continual and persistent disregard for the judicial process. The following summary of the proceedings disregarded by the petitioner will demonstrate the very substantial extent to which processes and orders of the District Court were ignored by the petitioner.

The petitioner was served personally with the summons and complaint, together with respondent Handel's interrogatories, on January 15, 1973. Thereafter, petitioner's New Jersey attorneys, Messrs. Kaufman and Kaufman, requested an extension of time to answer until February 25, 1973, which was granted. On March 12, 1973, the petitioner interposed an answer by the firm of Finkelstein, Benton & Soll, 515 Madison Avenue, New York, New York 10022.

On April 13, 1973, respondent Handel's attorneys notified petitioner's attorneys of their default in answering the interrogatories. In April, 1973, the attorneys for all parties were served with a notice to appear on May 29, 1973 at 4:00 o'clock in the afternoon before Judge Dudley B. Bonsal for a pre-trial conference to fix a trial date.

On May 23, 1973, respondent Handel served and filed motion papers, returnable at the pre-trial conference on May 29, 1973, for an order striking petitioner's answer and/or directing that the interrogatories be answered.

At the pre-trial hearing on May 29, 1973, no one appeared on behalf of the petitioner. Judge Bonsal therefore directed that an order be submitted upon notice to strike peitioner's answer unless petitioner answered on or before July 2, 1973 each and every interrogatory propounded by respondent Handel. This order was served by mail upon petitioner's attorneys of record, Messrs. Finkelstein, Benton & Soll, as well as Messrs. Kaufman & Kaufman and Messrs. Borden & Ball. Petitioner nonetheless did not answer respondent Handel's interrogatories.

By notice of motion dated October 5, 1973 returnable October 15, 1973 before Judge Bonsal, respondent Handel moved for (i) a judgment by default pursuant to F.R.C.P. 55, (ii) an inquest or hearing before the Court to determine the amount of damages and (iii) an award of attorneys' fees pursuant to F.R.C.P. 37(e). Notice of this motion also was served by mail upon Messrs. Finkelstein, Benton & Soll. At the hearing before

Judge Bonsal on October 15, 1973, petitioner again did not appear, and Judge Bonsal directed that a proposed order with notice of settlement be served upon the petitioner. The proposed order with notice of settlement was so served on October 15, 1973.

The proposed order (the "Order") was presented for settlement before Judge Bonsal on October 22, 1973, was signed by Judge Bonsal on October 23, 1973, and was entered by the clerk on October 26, 1973. The Order directed that an inquest be held before Magistrate Jacobs on November 29, 1973 (subsequently adjourned to December 19, 1973) to determine the amount of damages for which the respondent Handel should have judgment and the amount of attorneys' fees to be awarded to respondent Handel. By letter dated December 3, 1973, Messrs. Finkelstein, Benton & Soll were notified of the inquest scheduled for December 19, 1973. The Order directing the aforementioned inquest was duly served upon petitioner's attorneys on December 5, 1973.

On December 19, 1973, the aforesaid inquest was held before Magistrate Jacobs. Neither petitioner himself nor his attorneys attended. After a full hearing in which evidence was introduced, on January 2, 1974, Magistrate Jacobs rendered his report recommending the entry of judgment for respondent Handel in the amount of $150,000 plus interest thereon and attorneys' fees.

On January 8, 1974, Judge Bonsal approved Magistrate Jacobs' report and judgment pursuant thereto (the "Judgment")

was entered on January 18, 1974, more than one year after petitioner was personally served with respondent Handel's interrogatories.

On February 6, 1974, respondent Handel served upon petitioner by registered mail, and upon Messrs. Finkelstein, Benton & Soll by ordinary mail, a notice to take petitioner's deposition "pursuant to Rule 69 of the Federal Rules of Civil Procedure in aid of the judgment against said MEYER GOLD, entered January 18, 1974." Petitioner, having unquestionably so received notice of the Judgment as well as of his deposition, nonetheless defaulted in appearing, and petitioner apparently took no other remedial steps with respect to the Judgment or his noticed deposition.

On March 1, 1974, the Judgment of the District Court for the Southern District of New York was certified by the Clerk for registration in another district and was thereupon registered in the United States District Court for the District of New Jersey. Real property, apparently owned by petitioner, thereafter was attached. Only then, when petitioner finally faced the prospect of having to satisfy the Judgment, did petitioner show any respect for the judicial process. On July 17, 1974, Messrs. Lampert & Lampert served a notice of motion on behalf of petitioner for an Order to vacate and to set aside the Judgment "on the grounds of mistake and excusable neglect" pursuant to F.R.C.P. Rule 60(b). After reviewing the conclusory affidavits of petitioner and his attorney and an unsworn letter of petitioner's accountants in support of the motion, the District Court summarily denied petitioner's motion after a full hearing thereon and an asserted complete review of the entire record of this case.

Thereafter, petitioner appealed to the Court of Appeals for the Second Circuit, which court summarily affirmed the District Court's decision in open court and denied a petition for rehearing without opinion. Petitioner now seeks a writ of certiorari.

ARGUMENT

I.

Petitioner was not deprived of his property without due process of law.

The petitioner asserts that he has been deprived of his property without due process of law. In support of his assertion petitioner relies upon the decision of this Court in *Societe Internationale, etc. v. Rogers,* 357 U.S. 197 (1958). Such reliance is misplaced. *Societe Internationale, etc. v. Rogers, supra,* involved, *inter alia,* a request for relief from the dismissal of an action pursuant to F.R.C.P. 37 for failure to comply with a discovery order. This Court, after noting, at 209, that ". . . there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause," went on to add that "[*t*]*he authors of Rule 37 were well aware of these constitutional considerations.*" 357 U.S. at 209 (citation omitted, emphasis supplied). This Court thereafter specifically held, at 212, that:

> ". . . Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial

> production order *when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault* of petitioner." (Emphasis added.)

The petitioner has not demonstrated any inability to comply with the repeated orders of the District Court, but, rather, an utter disregard for the District Court's lawful orders and processes. Accordingly, the comforting umbrella of "denial of due process" cannot shield the petitioner from his repeated failures to respect the orders and processes of the District Court.

The petitioner further asserts a right to a "full evidentiary hearing" upon the authority of *Flaks v. Koegel*, 504 F.2d 702 (2d Cir. 1974). In *Flaks*, the District Court (per Lasker, J.) entered an order striking the defendants' answer because of the failure of the defendants to respond fully to interrogatories which had been served and because of the failure of defendant Koegel to appear at a deposition of David I. Koegel Enterprises, Inc., a corporation wholly owned by Koegel and his wife. The order also directed the clerk to enter a default judgment in the amount sought in the complaint, including punitive damages, plus interest. A motion to vacate the default judgment under F.R.C.P. 60(b) was made but denied by the Court, without a hearing, in a memorandum order. Final judgment in the sum of $919,147.50, which included punitive damages of $400,000, was entered by the clerk of the Court. There had been no proof of, or hearing to ascertain, damages. On appeal, the Court, upon a factual record bearing no resemblance to the factual background of the instant action, and relying upon *Societe Internationale, etc. v. Rogers, supra*, remanded *Flaks* to the District Court for

an evidentiary hearing ". . . so that appropriate findings may be made consonant with the due process standards we have discussed." 504 F.2d at 713.

Petitioner's reliance upon *Flaks* in aid of his position, however, is not sustainable. The Judgment below clearly did not overstep the constitutional limitations upon F.R.C.P. 37 set forth by the Second Circuit in *Flaks;* likwise, the District Court's denial of petitioner's Rule 60(b)(1) application, made six months after entry of the Judgment and more than five months after precise personal notice to petitioner of its existence, in no way compromised petitioner's rights to due process. Indeed, the record is clear that it was the petitioner himself who ignored and abused due process in the proceedings below. Without repeating in detail the complex factual situation in *Flaks,* the major pertinent factual distinctions between the posture of the defendants in *Flaks* and the posture of petitioner are as follows:

(i) In *Flaks,* there was a prolonged and bitter adversary pretrial discovery controversy ranging over an eighteen month period. In the instant action, there was a complete and total disregard by the petitioner of all notices and orders requiring discovery.

(ii) In *Flaks,* in response to a communication from the District Court, Koegel's personal attorney advised the District Court that Koegel was unable to retain new counsel (his former counsel having made an application to be relieved) and requested a hearing so that Koegel might testify and prove his arguments by documentary evidence. In the instant action, there was no application by petitioner's counsel to be relieved as

counsel of record and there was no specific request by petitioner or his counsel for a hearing for the purpose of setting forth documentary evidence.

(iii) In *Flaks,* Koegel had answered one hundred twenty-six (126) of some one hundred thirty (130) interrogatories propounded to him; Koegel further had taken the position that either counsel had been supplied with the information necessary to answer the remaining interrogatories or that more time was required to respond. In the instant action, no effort whatsoever was made by petitioner to answer any of the interrogatories and none, in fact, was answered.

(iv) In *Flaks,* the order for judgment was based, not on evidence produced at any hearing but, rather, on the affidavits of counsel for plaintiffs as well as the failure of defendants to comply with discovery orders. In the instant action, the liability of petitioner, as well as the quantum of damages, was established at a full hearing before Magistrate Jacobs.

(v) In *Flaks,* in addition to the defendant's affidavit made in support of a motion under F.R.C.P. 60(b), Koegel's former counsel submitted an affidavit on the motion as amicus curiae. In the instant action, no affidavits were submitted by petitioner's attorneys of record, Messrs. Finkelstein, Benton & Soll, or petitioner's original attorneys, Messrs. Kaufman & Kaufman.

(vi) In *Flaks,* the affidavits made in support of the Rule 60(b) motion presented the defendants' position in detail. In the instant action, the affidavits made in support of petitioner's Rule 60(b) motion presented only conclusory and hearsay statements.

(vii) In *Flaks*, the District Court, without any hearing, denied the Rule 60(b) motion. In the instant action, the District Court offered the petitioner (who apparently chose not to attend personally the hearing on his Rule 60(b) motion), through his present counsel, Messrs. Lampert & Lampert, who appeared at such hearing, every opportunity to present, at such time, facts to support a showing of mistake or excusable neglect. Petitioner's attorneys failed to make any such showing.

There is, simply, no similarity between the situation at bar and the situation before the Court in *Flaks*. In fact, Judge Mulligan who wrote the decision in *Flaks v. Koegel, supra,* was on the panel of the Second Circuit which unanimously affirmed the decision of the District Court in the instant action. If relief from final judgment under F.R.C.P. 60(b) is afforded under the circumstances present in the case at bar, it is difficult to conceive of any circumstance in which similar relief will not be granted. The result would be an emasculation of those provisions of the Federal Rules of Civil Procedure which are designed to achieve the efficient administration of justice through the avoidance of undue prolongation of litigation.

Finally, petitioner's reliance upon *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858 (5th Cir. 1970) is erroneous. The factual situation presented by *Dorsey* was completely different from that at bar. In *Dorsey* the movant had substantially complied with the discovery requests of her adversary, and her failure to produce each record required was not due to any "willfulness, bad faith, or fault" on her part. At bar, the petitioner has shown nothing but a

continual disregard for the rules of justice and must not now be permitted to hide behind the shield he so blatantly disregarded.

Therefore, petitioner's belated and erroneous statement before this Court that he was denied due process of law is without basis in law or in fact.

II.

Respondents were not required to give personal notice to petitioner prior to the entry of the default judgment.

The petitioner would have this Court believe that the respondent took unfair advantage of the petitioner in that it failed to do that which it had no obligation to do. In support of his contention the petitioner cites *Vindigni v. Meyer*, 441 F.2d 376 (2d Cir. 1971). The decision in *Vindigni* has no application to the dispute herein. In fact the Court itself so recognized the special circumstances of the case when it stated in its conclusion, at p. 378, that "[i]n reversing the order in this case, we do not depart from the regular course of our decisions upholding discretionary orders of dismissal for failure to prosecute" (citations omitted). In *Vindigni*, the Court was faced with the complete disappearance of the movant's attorney. At bar the petitioner has not made a *prima facie* showing that his attorneys had disappeared and that the situation could not have been remedied by a diligent effort on his part to obtain other counsel. Therefore the petitioner must be deemed bound by notices served on his freely selected agents. *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962);

Hoffman v. Celebrezze, 405 F.2d 833 (8th Cir. 1969); *Geigel v. Sea Land Service, Inc.*, 44 F.R.D. 1 (D.P.R. 1968); *Flett v. W.A. Alexander & Co.*, 302 F.2d 321 (7th Cir. 1962); *Smith v. Stone*, 308 F.2d 15 (9th Cir. 1962).

III.

The petition should be denied.

The petition should be denied as it fails to satisfy the considerations governing review on certiorari, as guided by Rule 19 of the Rules of the Supreme Court of the United States, 28 U.S.C.A. 1254(1) and the practice of this Court.

Rule 19 of the Rules of the Supreme Court of the United States provides in relevant part:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> * * *
>
> (b) Where a court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The petitioner has failed to demonstrate the applicability of the only arguably relevant consideration governing the granting of review on certiorari, *i.e.*, that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court. . . ." Absent unusual and compelling circumstances, an application by a District Court of the Federal Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. *Appalachian Power Co. v. American Institute of Certified Public Accountants*, 361 U.S. 82 (1959).

As was stated in *U.S. ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956):

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'"

The petitioner has not sustained the burden of proof governing review on certiorari and hence his petition should be denied. See *Beck v. Washington*, 369 U.S. 541 (1962); *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943); *Higgins v. Carr Bros. Co.*, 317 U.S. 572 (1943).

CONCLUSION

For the reasons stated herein, respondent requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

s/ Leo Silverstein

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